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IN THE

Supreme Court of the United States

CITY OF SACRAMENTO AND MIKE KASHIWAGI, DIRECTOR OF THE DEPARTMENT OF PUBLIC WORKS OF THE CITY OF SACRAMENTO, IN HIS OFFICIAL CAPACITY,

Petitioners,

v.

JOAN BARDEN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CALIFORNIA CITIES AND JOINT POWERS AUTHORITIES; THE CITY OF DENVER, COLORADO; THE TERRITORY OF GUAM; AND THE COMMONWEALTH OF PUERTO RICO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the California Cities of Agoura Hills, Alameda, Albany, Aliso Viejo, Alturas, Amador City, American Canyon, Anaheim, Antioch, Arcadia, Arcata, Arvin, Avalon, Avenal, Bakersfield, Baldwin Park, Barstow, Beaumont, Bellflower, Bell Gardens, Belmont, Benicia, Big Bear Lake, Brentwood, Burlingame, Calexico, California City, Calistoga, Camarillo, Campbell, Capitola, Carlsbad, Carmel-By-the-Sea, Ceres, Chino Hills, Chula Vista, City of King, Clayton, Chowchilla, Clovis, Coalinga, Colma, Colton, Commerce, Concord, Corona, Cypress, Danville, Del Mar, Del Rey Oaks, Diamond Bar, Dinuba, Dublin, El Centro, Elk Grove, Emeryville, Encinitas, Etna, Eureka, Exeter, Firebaugh, Fontana, Fort Bragg, Fortuna, Foster City, Fountain Valley, Fowler, Fremont, Fresno, Galt, Garden Grove, Glendale, Gilroy, Glendora, Grand Terrace, Grass Valley, Gridley, Hanford, Hayward, Hemet, Hermosa Beach, Hollister, Holtville, Hughson, Huntington Beach, Huntington Park, Huron, Indian Wells, Irvine, Irwindale, Isleton, Jackson, Kerman, Laguna Beach, Lakeport, Lakewood, Lancaster, La Puente, Lathrop, La Mesa, La Verne, Lemoore, Lemon Grove, Lindsey, Livermore, Lodi, Long Beach, Loomis, Los Alamitos, Los Altos, Los Banos, Los Gatos, Lynwood, Manteca, Marina, Marysville, Mendota, Merced, Millbrae, Mill Valley, Mission Viejo, Monrovia, Montclair, Monterey, Montebello, Monterey Park, Moreno Valley, Moorpark, Moraga, Mountain View, Mt. Shasta, Murrieta, Napa, Newark, Newport Beach, Norco, Novato, Oakley, Ontario, Orange, Orange Cove, Orinda, Oroville, Pacific Grove, Palm Desert, Palm Springs, Paramount, Perris, Pico Rivera,

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[1] The parties have consented to the filing of this *amicus* brief, and their letters of consent have been filed with the Clerk. This *amicus* brief was not authorized in whole or in part by counsel for a party, and no person or entity other than *Amici* or their members made a monetary contribution toward its preparation or submission.

Placerville, Pleasant Hill, Pleasanton, Porterville, Rancho Santa Margarita, Red Bluff, Redding, Redlands, Reedley, Redondo Beach, Rialto, Ridgecrest, Ripon, Rio Vista, Riverside, Rocklin, Rolling Hills Estates, Rosemond, Roseville, Ross, San Buenaventura, San Carlos, San Clemente, San Dimas, San Gabriel, San Joaquin, San Jose, San Marcos, San Mateo, San Pablo, Santa Clarita, Santa Rosa, Santee, Sausalito, Selma, Signal Hill, Simi Valley, Sonora, South Gate, Stockton, Sunnyvale, Tehachapi, Thousand Oaks, Tiburon, Torrance, Truckee, Turlare, Turlock, Tustin, Union City, Vacaville, Vallejo, Ventura, Vernon, Victorville, Vista, Walnut, Wasco, Waterford, Watsonville, Weed, Willits, Woodlake, Woodland, Yreka, Yuba City, the California Joint Powers Risk Management Authority, the Redwood Empire Municipal Insurance Fund, the City of Denver, Colorado, the Territory of Guam, and the Commonwealth of Puerto Rico (collectively, "*Amici Curiae*") respectfully submit this Brief as *Amici Curiae* in support of Petitioners the City of Sacramento, et al.

Each of the California Cities participating as an *Amici Curiae* is a member of the League of California Cities.[2] The California Joint Powers Risk Management Authority is a California Public Agency whose membership includes 16 California Cities and five joint powers authorities. The Redwood Empire Municipal Insurance Fund is a joint powers authority that handles the liability claims and losses for 15 Northern California Cities. The City of Denver, Colorado is a municipality. The Territory of Guam is an organized, unincorporated territory of the United States. The Commonwealth of Puerto Rico is a commonwealth associated with the United States. *Amici* have a compelling interest in the legal issues presented in the City of Sacramento's Petition

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[2] As a matter of policy, the League of California Cities does not participate as an *amicus curiae* in its own name, but instead authorizes and recommends participation by its individual municipal members, which the League has done in this case.

for a Writ of Certiorari. Cities in California and throughout the United States have spent hundreds of millions of dollars in public funds to comply with the program access requirements of Title II of the Americans with Disabilities Act ("ADA"). Under Title II, Congress directed that public programs, services and activities be made accessible to persons with disabilities, and public entities have been required to prioritize their allocation of funding and other resources in accordance with the program accessibility mandate.

Consistent with Congress' requirement of program access, public entities have prioritized their expenditures to eliminate programmatic barriers, and they are removing non-programmatic barriers through the incorporation of accessible design features when structures are constructed or altered. This prioritization between programmatic and non-programmatic barriers has allowed the cities to achieve broad program accessibility, while allowing non-programmatic barriers to be efficiently eliminated by means of the incremental process of replacement through new construction and alterations.

If the decision of the Court of Appeals for the Ninth Circuit in this case were allowed to stand, public entities would lose the ability to prioritize funding toward the elimination of programmatic barriers, and they could potentially be burdened with the enormous cost of rebuilding the entire public infrastructure – approximately $2.5 billion for sidewalks in California alone – despite Congress' clear intent that non-programmatic barriers be eliminated solely through the incorporation of accessible features in new construction and alterations.

For these reasons, *Amici* respectfully submit this Brief in support of Petitioner the City of Sacramento's Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

When Congress enacted the Americans with Disabilities Act of 1990 ("ADA"), it sought to balance the societal interest in greater disabled access with the need to ensure the efficient use of limited public resources. The ADA and its implementing regulations reflect Congress' recognition that it would be impossible and undesirable to require the demolition and rebuilding of the nation's entire public infrastructure in order to achieve universal accessibility to persons with disabilities. Instead, the ADA and its implementing regulations incorporated a two-part approach designed to improve the accessibility of the existing infrastructure: (1) through the imposition of a program access standard applicable to existing facilities where programs are offered; and (2) by requiring the incorporation of accessibility features in new construction and alterations.

Under this approach, the public infrastructure has been and continues to be made fully accessible incrementally through the enforcement of current access standards in new construction or alterations.[3] During this transition period, public entities are not required to rebuild or modify existing non-programmatic structures, but they do need to comply with the program access standard, which requires that public programs, services and activities be made accessible to persons with disabilities.

Disregarding this balancing approach, the Ninth Circuit has effectively reinterpreted the program access standard to require universal access to the entire public infrastructure. Although the Ninth Circuit and other courts of appeals had previously interpreted the term "program" to require some

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[3] The Department of Justice, however. has not yet issued design access standards for new construction and alterations in the public rights-of-way. 64 Fed. Reg. 43,980, 43,980-81 (1999).

form of public "action" or "output,"[4] the Ninth Circuit nevertheless held in this case that existing sidewalks and other structures in the public rights-of-way are a "program" for purposes of Title II of the ADA and Section 504 of the Rehabilitation Act.

This decision is patently wrong, and is in conflict with the prior body of circuit court case law, as well as inconsistent with the statutory language and regulations at issue. Existing sidewalks and other structures in the public rights-of-way are not "actions" or "outputs" of public entities, but rather are physical things that have an existence independent of any ongoing program, service or activity. Nor is a public entity's mere ownership of existing structures in the public rights-of-way sufficient to make those structures "programs" for purposes of the ADA and Rehabilitation Act. Ownership of property is not an "action" or "output" but rather is a legal relationship expressed as "the right of one or more persons to possess and use [the property] to the exclusion of others." *G.S. Rasmussen & Assoc, Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 902 (9th Cir. 1992) (quoting CAL. CIV. CODE § 654). As the courts had previously held, a mere legal relationship between a public entity and others is not a "program," "service" or "activity." *See Zimmerman*, 170 F.3d at 1175-76 (employment relationship between a public entity and person is not a "program" or "activity" provided by a public entity). *See also Decker v. Univ. of Houston*, 970 F. Supp. 575, 578 (S.D. Tex. 1996) ("[t]he phrase 'services, programs, or activities' . . . understood as a whole, focuses on a public entity's outputs rather than its inputs"), *aff'd*, 159 F.3d 1355 (5th Cir. 1998) (table).

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[4] *See Zimmerman v. Oregon Dep't of Justice*, 170 F.3d 1169, 1174 (9th Cir. 1999) (term "program" means some form of public "action" or "output"), *cert. denied*, 121 S. Ct. 1186 (2001); *Johnson v. City of Saline*, 151 F.3d 564, 570 (6th Cir. 1998) (term "program" refers to "activities of a public entity").

The Ninth Circuit's holding that the mere existence of a structure in the public rights-of-way constitutes a "program" will overturn the entire regulatory framework for disabled access. Under the Ninth Circuit's reinterpretation of the program access requirement, all structures and facilities will need to be made accessible at enormous cost, regardless of whether programs were offered at those structures and facilities, and notwithstanding the clear language of the applicable regulation that a public entity need only identify and remediate "physical obstacles in [its] facilities *that limit the accessibility of its programs or activities* to individuals with disabilities." 28 C.F.R. § 35.150(d)(3)(i) (emphasis added).

ARGUMENT

A. The Court of Appeals Erred in Holding That Existing Sidewalks Are a City Program, Service or Activity, and Thus Are Subject to the Program Access Requirements of the ADA and Rehabilitation Act.

1. The Statutes at Issue Provide for Access to a Public Entity's Programs, Services and Activities.

Respondents' claims are based on Title II of the ADA, 42 U.S.C. § 12101, *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. Title II of the ADA is the "public services" title and proscribes the denial of the benefits of "services, programs or activities" of a public entity on the basis of disability:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation or denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

Section 504 of the Rehabilitation Act similarly prohibits discrimination against disabled persons in federally-assisted programs and activities:

> No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794.

To prove a violation under Title II, a plaintiff must show: (1) he or she is a "qualified individual with a disability"; (2) he or she was either excluded from participation in or denied the benefits of a public entity's "services, programs or activities," or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits or discrimination was by reason of the disability. 42 U.S.C. § 12132; *Weinreich v. Los Angeles County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997). Similarly, under Section 504 of the Rehabilitation Act, a plaintiff must show: (1) he or she is a "qualified individual with a disability"; (2) he or she was denied the benefits of the program solely by reason of the disability; and (3) the program received Federal financial assistance. 29 U.S.C. § 794; *Bonner v. Lewis*, 857 F.2d 559, 562-63 (9th Cir. 1988).

A plaintiff must prove the denial of access to a public entity's program, service or activity, regardless of whether the plaintiff's claim is brought under Title II's program access provision or the general anti-discrimination provision. *Zimmerman v. Oregon Dep't of Justice*, 170 F.3d 1169, 1175-76 (9th Cir. 1999), *cert. denied*, 121 S. Ct. 1186 (2001). A plaintiff is not "qualified" to bring a Title II claim unless he or she "meets the essential eligibility requirements" of a program, service or activity provided by a public entity. *Id.* at 1175. The general anti-discrimination provision, therefore, must relate to a government program, service or activity;

otherwise a plaintiff is not "qualified" to bring a claim under that clause. *Id.*

2. The Applicable Regulations Provide Different Rules for Existing Facilities and New Construction or Alterations.

The ADA directs the United States Attorney General to promulgate regulations to implement Title II. These regulations are codified in Title 28, Chapter 35 of the Code of Federal Regulations. The regulations establish separate requirements for existing facilities and for new construction and alterations. As set forth below, the regulations impose broader accessibility requirements for new construction and alterations than for existing facilities.

Section 35.151 applies to newly-constructed or altered facilities and requires that new construction and alterations commenced after January 26, 1992 be performed in such a manner that the new or altered facility, or part of the facility, is readily accessible to and usable by individuals with disabilities. 28 C.F.R. § 35.151(a)-(b). It mandates that new construction or alterations be performed in conformance with the Uniform Federal Accessibility Standards ("UFAS") or the ADA Accessibility Guidelines ("ADAAG") to be issued by the United States Architectural and Transportation Barriers Compliance Board ("Access Board"). *Id.* § 35.151(c).

By contrast, Section 35.150, which applies to existing facilities, specifically provides that public entities do *not* have to make each existing facility accessible to and usable by individuals with disabilities. *Id.* § 35.150(a)(1). Instead, Section 35.150 reiterates the Congressional mandate of program accessibility, and states that "[a] public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." *Id.* § 35.150(a).

A critical distinction between newly-constructed or altered facilities and existing facilities is that a public entity's

obligation to maintain accessible features in operable working condition applies only to newly-constructed or altered features. *Id.* § 35.133(a). Section 35.133 provides that "[a] public accommodation shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part." *Id.* Because existing non-programmatic facilities need not be readily accessible and usable, Title II does *not* mandate that such facilities be maintained in operable working condition.

As a means of ensuring program accessibility, public entities employing at least 50 persons must adopt a transition plan if structural changes are undertaken to achieve *program* accessibility. *Id.* § 35.150(d)(1) (emphasis added). In preparing the transition plan, the public entity must "[i]dentify physical obstacles in the public entity's facilities *that limit the accessibility of its programs or activities* to individuals with disabilities." *Id.* § 35.150(d)(3)(i) (emphasis added). The public entity must describe in detail the methods that will be used to make these facilities accessible, specify the schedule for doing so, and identify the responsible official. *Id.* § 35.150(d)(3)(ii)-(iv). As this regulatory language makes clear, the transition plan need only address programmatic barriers in existing facilities.

3. Existing Sidewalks Are Not a Public Program, Service or Activity.

Despite the plain language requiring only that programmatic barriers be addressed in the transition plan, the Ninth Circuit's decision will require public entities to identify and remove all physical obstacles in existing facilities. *Id.* § 35.150(d)(3)(i). By effectively interpreting the terms "facilities," "programs" and "activities" as equivalent, interchangeable terms, the Ninth Circuit's decision will effectively remove from the regulation the terms "programs" and "activities."

The interpretation of the terms "programs" and

"activities" as interchangeable with the preceding term "facilities" will drastically change the meaning and scope of Section 35.150(d), and will require public entities to make existing non-programmatic structures accessible, despite the clear language limiting the transition plan requirements to "physical obstacles in the public entity's facilities *that limit the accessibility of its programs or activities* to individuals with disabilities." *Id.* § 35.150(d)(3)(i) (emphasis added).

The Ninth Circuit's interpretation of these terms not only violates the maxim against the interpretation of statutes or regulations that renders terms inoperative or superfluous,[5] but conflicts with its own earlier decisions, and those of other courts of appeals, interpreting the term "program" to mean some form of public "action" or "output." *Zimmerman v. Oregon Dep't of Justice*, 170 F.3d 1169, 1174 (9th Cir. 1999), *cert. denied*, 121 S. Ct. 1186 (2001). *See also Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 731-32 (9th Cir. 1999) (definition of "program" encompasses public "operations" and things that a public entity "*does*," including zoning "activities") (emphasis added); *Johnson v. City of Saline*, 151 F.3d 564, 570 (6th Cir. 1998) (term "program" refers to "activities of a public entity").

An existing sidewalk is not an "action," "output," "operation" or "activity" of a public entity. Rather, a sidewalk is a structure that exists independent of any ongoing program, service or activity. Likewise, a public entity's ownership of existing sidewalk is not an "action" or "output" but, rather, is a legal relationship defined as "the right of one or more persons to possess and use [the property] to the

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[5] *See, e.g., Andreiu v. Ashcroft*, 253 F.3d 477, 480 (9th Cir. 2001) ("statutes must be interpreted, if possible, to give each word some operative effect") (internal punctuation omitted); *Glover v. West*, 185 F.3d 1328, 1332 (Fed. Cir. 1999) ("we attempt to give full effect to all words contained within th[e] statute or regulation, thereby rendering superfluous as little of the statutory or regulatory language as possible").

exclusion of others." *G.S. Rasmussen & Assoc, Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 902 (9th Cir. 1992) (quoting CAL. CIV. CODE § 654). *See also Zimmerman*, 170 F.3d at 1175-76 (employment relationship between public entity and employee is not a "program" or "activity").

4. The Regulations Identify Missing Curb Ramps as the Only Feature to Be Identified in the Transition Plan.

Significantly, Section 35.150(d) contains a separate provision setting forth the transition plan requirements that apply when "a public entity has responsibility or authority over streets, roads, or walkways." 28 C.F.R. § 35.150(d)(2). Subsection (d)(2) specifically provides that "[i]f a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs." *Id.* Subsection (d)(2) imposes no further transition plan requirements on public entities having responsibility or authority over public rights-of-way, and it excludes any reference to the broader transition plan requirements applicable to facilities other than streets, roads and walkways.

Under the statutory canon of *expressio unius*, the incorporation of the specific curb-ramp requirements in Subsection (d)(2) to the exclusion of the more general requirements set forth in Subsection (d)(3) must be presumed intentional. *Botosan v. Paul McNally Realty*, 216 F.3d 827, 832 (9th Cir. 2000). It is presumed that the Department of Justice ("DOJ") intended to include in Subsection (d)(2) all of the transition plan requirements that apply to public rights-of-way, since the DOJ included in Subsection (d)(2) the specific curb-ramp requirements but excluded any reference to the

more general transition plan requirements that apply outside the public rights-of-way.[6] *Id.*

Section 35.150(d)(2), then, should be interpreted as setting forth the definitive transition plan requirements for public streets, roads and walkways, and Subsection (d)(3) should be construed as setting forth more general requirements applicable to locations outside the public rights-of-way.[7]

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[6] *See also Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228, 77 S. Ct. 787, 791-92 (1957) ("However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment. Specific terms prevail over the general in the same or another statute which otherwise might be controlling") (internal punctuation omitted); *Weiss v. CIGNA Healthcare, Inc.*, 972 F. Supp. 748, 754 (S.D.N.Y. 1997) ("the general language of a statute will not be held to apply to a matter specifically dealt with in another part of the same enactment") (internal punctuation omitted).

[7] The DOJ's new position on this issue, articulated for the first time in its *amicus* brief in the proceedings below, is directly contrary to its long-held position that the program access requirement applies to sidewalks only when they provide immediate access to a facility where a public program, service or activity is offered. *See* 5/14/98 Letter from Bill Lann Lee, Acting Assistant Attorney General, Civil Rights Division, to U.S. Representative William D. Delahunt ("*if the sidewalk is part of an accessible route that is required to provide access to a covered program or activity*, the public entity that provides the program would be required to ensure the sidewalk remains accessible") (emphasis added), *available at* http://www.usdoj.gov/crt/foia/tal760.txt; 12/21/95 Letter to U.S. Representative Charles H. Taylor ("if a public entity has responsibility for, or authority over, sidewalks or other public walkways, *and if such sidewalks or walkways are necessary to ensure accessibility to the entity's programs, services, or activities*, then the public entity has an obligation to maintain the sidewalks or walkways in usable working condition") (emphasis added), *available at* http://www.usdoj.gov/crt/foia/tal661.txt.

Further, the DOJ's reliance on the transition plan requirements relating to curb ramps as support for its new position is misplaced. The requirement in 28 C.F.R. § 35.150(d)(2) that a public entity include in its transition plan a schedule for providing curb ramps does not mean that the

B. Applying the Program Access Standard to Existing Sidewalks Where No Programs Are Offered Undermines the Goals Underlying the Standard.

The imposition of the program access standard on sidewalks and other structures in the public rights-of-way where no public programs, services or activities are offered will jeopardize public entities' ability to achieve the levels of accessibility mandated by Title II of the ADA and Section 504 of the Rehabilitation Act. Public entities have only limited funds and other resources available to spend on public facilities and infrastructure, and need to preserve their ability to concentrate the expenditure of these resources where it will actually improve the accessibility of their programs, services and activities to persons with disabilities. The Ninth Circuit's broadening of the program access standard to encompass all physical structures, regardless of whether public programs are offered at those structures, will divert public expenditures to facilities where no programs are offered, and will thereby reduce the overall benefit to disabled persons while greatly increasing the cost of accessibility compliance.

In California, the enormous scale of the public rights-of-way ensures that the Ninth Circuit's decision will have profound impacts on public entities' ability to comply with the program access standard. California's cities obtain public funds from finite Federal, State and local sources, and their ability to generate additional tax revenues is subject to

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entity's public rights of way constitute a public program. On its face, this procedural mandate is directed solely at documenting progress toward the universal installation of curb ramps, which is being achieved voluntarily by cities throughout the United States, and does not contain any substantive requirement for the installation of curb ramps on existing sidewalks. Any such requirement would be invalid, since Congress clearly required that existing structures be rebuilt or altered only where necessary to achieve program access, and Congress left no room for any regulation mandating the rebuilding or altering of existing structures where no public programs, services or activities are offered.

numerous legal, political and economic constraints. In order to meet the cities' legal responsibility to provide for the public safety, utilities, health and other needs, most of their tax revenues must be spent on governmental functions other than transportation.[8] Of the estimated 8% of total revenues available for city streets and roads,[9] all but a small fraction must be spent on new construction, reconstruction, signals and safety devices.[10] In the most recent fiscal year reported, only approximately $55 million in public funds were available to California's cities to spend on pedestrian ways and bicycle paths.[11]

California has an estimated 166,971 miles of public roadway, of which 69,422 miles (approximately three times the Earth's circumference) are city streets.[12] At an estimated per-mile sidewalk construction cost of $36,000[13] (for both sides of the street, at the four-foot width that Respondents contend is required), the costs to California cities of

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[8] *See* CAL. STATE CONTROLLER, CITIES ANNUAL REPORT, at xx, Figure 16 (2001), *available at* http://www.sco.ca.gov/ard/local/locrep/cities/9899/cities.shtml. *Amici* request that the Court take judicial notice of the statistical information set forth in this Brief, which is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. FED. R. EVID. 201(b).

[9] *Id.*

[10] CAL. STATE CONTROLLER, STREETS AND ROADS ANNUAL REPORT, at xii, Figure 14 (2002), *available at* http://www.sco.ca.gov/ard/local/locrep/streets/90-00/.

[11] *Id.*

[12] *See* CAL. DEP'T OF FINANCE, CALIFORNIA STATISTICAL ABSTRACT, Table J-1 (2000), *available at* http://www.dof.ca.gov/html/fs_data/stat-abs/sec_J.htm. *See also* NEW YORK PUBLIC LIBRARY SCIENCE DESK REFERENCE at 372 (MacMillan) (the Earth's circumference at the equator is 24,901 miles).

[13] *See* FLA. DEP'T OF TRANSPORTATION, COST OF URBAN TRANSPORTATION SYSTEMS, Unit Costs for Bicycle and Pedestrian Facilities (1996), *available at* http://www.commuterservices.com/costs.htm.

rebuilding their existing sidewalks to conform with the design standards sought by Respondents would total approximately $2.5 billion, exclusive of the costs of demolition and acquisition of enlarged rights-of-way. Given the fundamental sidewalk design changes that Respondents contend is required to make the public rights-of-way accessible, the costs of altering existing sidewalks to implement such changes would likely exceed the costs of demolition and rebuilding, such that a total cost of $2.5 billion would be likely regardless of whether the changes were achieved through rebuilding, alteration, or both.[14]

The extraordinary magnitude of such an undertaking would overwhelm the cities' resources and be impossible to achieve. Yet despite the enormous costs that would be required to rebuild the existing sidewalk infrastructure, there would be no commensurate benefit in the accessibility of public programs, services and activities, since Respondents seek to require the cities to rebuild sidewalks and other structures in rights-of-way where no programs, services or activities are offered.[15]

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[14] The total cost of rebuilding or altering sidewalks nationwide would likely be ten times that amount (or approximately $25 billion). The urban street system in the United States contains in excess of 800,000 miles of street – more than ten times the mileage of California's city streets. *See* U.S. DEP'T OF TRANSPORTATION, U.S. PUBLIC ROAD AND STREET MILEAGE BY FUNCTIONAL SYSTEM (2000), *available at* http://www.bts.gov/btsprod/nts/Ch1_web/1-5.htm.

[15] Respondents argued below that the adoption of their interpretation of "program" to mean any structure in the public rights-of-way would have only "limited" impact on public entities, because public entities could rely on the "undue burden" provisions of the ADA and its regulations. This argument ignores the breadth of the injunctive relief sought by Respondents in the proceedings in the District Court.

Further, to the extent that Respondents will contend that "undue burden" is an affirmative defense for which public entities have the burden of proof, Respondents' position would improperly shift to public entities the burden of proving that the removal of non-programmatic barriers

CONCLUSION

Existing sidewalks in the public rights-of-way are not programs, services or activities of a public entity, nor is a public entity's ownership of existing sidewalks a program, service or activity. The applicable statutes and regulations do not require that existing non-programmatic structures be made accessible to persons with disabilities, consistent with Congress' recognition that accessibility should be achieved through a cost-effective, two-part process of: (1) requiring accessibility in facilities where public programs, services and activities are offered; and (2) mandating the incorporation of accessibility features in new construction and alterations.

Existing structures in the public rights-of-way where no programs, services or activities are offered do not fall into either category, and thus are not subject to the transition plan requirements of the statutes and regulations at issue in this appeal. Neither the statutes nor the regulations provide a basis for requiring public entities to expend the billions of

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would be unduly burdensome, despite the fact that the ADA and its enabling regulations do not require the elimination of non-programmatic barriers (other than through the process of incorporating accessibility features in new construction and alterations).

Additionally, Respondents' "undue burden" argument disregards the enormous cost of the sidewalk accessibility surveys that Respondents contend must be performed before any "undue burden" analysis can be undertaken. Respondents seek to require public entities to survey the configurations of each sidewalk – which are constantly changing due to tree growth, subsidence and other physical forces beyond the cities' control – to identify physical obstacles to accessibility. This undertaking, alone, would impose massive costs on public entities with no benefit to program accessibility.

Finally, *Amici* anticipate that a court might conceivably determine the undue burden defense to be inapplicable to the transition plan survey provisions of 28 C.F.R. § 35.150(d). To the extent any such determination were correct, public entities could be required to undertake the phenomenal expense of surveying all sidewalks nationwide, without the availability of the undue burden defense.

dollars required to survey and rebuild or alter sidewalks in the public rights of way where no public programs, services or activities are offered.

Amici Curiae, therefore, respectfully request that this Court grant the Petition for a Writ of Certiorari of Petitioner the City of Sacramento, et al.

Respectfully submitted,

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